STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 16,391
	)	
Appeal of	)	

INTRODUCTION

The petitioner seeks to expunge a record in the registry of the Department of Social and Rehabilitation Services that he sexually abused his two daughters. The preliminary question in this case is whether the Department can rely solely on "hearsay" evidence to prove the allegations in this case if neither daughter is present for cross-examination at the hearing.

RULING

The Department of Social and Rehabilitation Services may not rely solely on "hearsay" evidence to prove the allegations in a child sexual abuse record unless the alleged victim is made available to testify pursuant to V.R.E. 804a. In the case of a deceased child, hearsay statements may only be admissible if they meet the requirements of V.R.E. 804.

DISCUSSION

No evidence has yet been taken in this matter pending a ruling on this important legal issue of evidence. The ruling in this matter will affect not only the conduct of this case but virtually every expungement hearing that comes before the Board. The questions raised herein require the interpretation of state evidentiary rules and the consideration of due process questions under the Fourteenth Amendment of the United States Constitution.

The Human Services Board is required by its own administrative rules to follow the "rules of evidence applied in civil cases by the courts of the State of Vermont". Fair Hearing Rule 12. Those rules generally forbid the use of "hearsay" testimony to try to prove an allegation. "Hearsay" is defined in the Vermont Rules of Evidence as "a statement, other than one made by the declarant while testifying at the trial of hearing, offered in evidence to prove the truth of the matter asserted". V.R.E. 801. In the context of expungement hearings, "hearsay" evidence most often takes the form of taped statements of children and the testimony and notes of therapists and investigators offered to prove the fact of the sexual abuse. Such evidence would be considered

inadmissible hearsay under state evidentiary rules unless it was admissible under some exception to the hearsay rule.

Because SRS has an obligation to protect children and because children are frequently newly traumatized by repeating their allegations in a formal setting, the agency is repeatedly confronted with a dilemma when it tries to prove the facts it relied upon in entering findings in its registry. It is almost always the case that there are no witnesses to the abuse, no physical evidence of the abuse and no admissions of the abuse by the alleged perpetrator. The only evidence is the statement of the child victim and, under the formal rules of evidence, the only way those statements can be taken into evidence (unless they are subject to an enumerated exception) is through the direct testimony of the child.

The Board has been responsive to this dilemma in the past by invoking a special exception to the "hearsay rule" found its own administrative rules. The so-called "relaxed hearsay rule" allows substitutions for the direct testimony of the alleged victim when the hearing officer determines that following the formal rules would create an "unnecessary hardship and the evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs". Fair Hearing Rule 12. Under this relaxed rule,

which was applied for over a decade, the Board typically found that it was a hardship to produce the alleged child victim and admitted some other evidence in lieu of the child's testimony, most commonly tape-recorded statements, and therapist and investigator notes and testimony. That hearsay testimony was subjected to rigorous scrutiny for trustworthiness and was often ultimately rejected by the hearing officer. The Board considered this a fair relaxation of the rule not only because of this strict scrutiny of the hearsay but also because the Department's burden of proof was not high ("a preponderance of the evidence") (see 33 V.S.A. § 4916(h)) and, most importantly, because the loss of property or liberty to the petitioner by being listed in the registry was minimal.[1]

About seven years ago, a challenge was made to this process through an appeal to the Supreme Court by a petitioner who was found to have sexually abused two children based only on hearsay evidence. Fair Hearing No. 11,766. In its decision the Supreme Court affirmed that the Board could correctly support a decision that sexual abuse occurred solely through the use of hearsay evidence:

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[1] Under the Vermont statutes, the registry finding can only be disclosed to licensees of the agency, such as a day care center (33 V.S.A. § 4919), and specifically cannot be disclosed for "employment purposes, for credit

> Although the Board's decision is supported only by hearsay evidence, that evidence has sufficient indicia of reliability to support a finding by a preponderance of the evidence that the alleged abuse occurred. See *Watker v. Vermont Parole Bd*., 157 Vt. 72, 76-77,596 A.2d 1277, 1280 (1991) (hearsay may be sole evidence in revocation proceeding if determined inherently reliable). In *Watker* we stated that we must "evaluate the weight each item of hearsay should receive according to the item's truthfulness, reasonableness, and credibility". *Id* at 77, 596 A.2d at 1280. Here, the sources of the hearsay evidence had sufficient indicia of reliability to support the Board's decision.
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> In re Selivonik 164 Vt. 383, 390 (1995)

The Board continued to use this standard, believing that it had been approved by the Vermont Supreme Court. However, in 1996, the Board, in a rare rejection of the hearing officer's finding that the hearsay evidence offered in the case was unreliable[2], made a finding of sexual abuse against a father of his child based solely upon hearsay evidence. That decision was appealed to the Supreme Court. See Fair Hearing No. 13,720. The Supreme Court reinstated the hearing officer's finding that the hearsay testimony had been unreliable on the issue of whether the child had been telling the truth and reversed the Board's denial of the expungement. In re C.M. 168 Vt. 389 (1998). However, the Court went

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purposes or to a law enforcement agency other than the state's attorney." 33 V.S.A. § 4916(d).

[2] The hearsay evidence in this case consisted primarily of the testimony of the mother and the aunt as to what the child had said to them.

further to decide an important issue raised by the petitioner, which was the use of the "relaxed hearsay" rule in proceedings involving sexual abuse allegations. The petitioner argued that the Board should be subject to the restrictions in Rule 804a, an evidentiary exception in the Vermont Rules of Evidence, even though the Board was not specifically enumerated as an administrative agency covered by the rule. The Department argued that the Board should be allowed to continue to use its Rule 12 in these cases. However, the Court agreed with the petitioner that the legislature intended to include all administrative agencies in V.R.E. 804a. It "found no reason to exclude expungement proceedings from this general rule" and concluded that "V.R.E. 804a applied in determining the admissibility of child hearsay statements concerning sexual abuse in an expungement hearing". Id at 396.

V.R.E. 804a is quite different from Rule 12 in that it requires that the child be made available at the hearing before the hearsay statements are allowed in:

> RULE 804a. HEARSAY EXCEPTION; PUTATIVE VICTIM AGE TEN OR UNDER; MENTALLY RETARDED OR MENTALLY ILL ADULT
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> (a) Statements by a person who is a child ten years of age or under or a mentally retarded or mentally ill adult as defined in 14 V.S.A. Sec. 3061 at the time of trial

> are not excluded by the hearsay rule if the court specifically finds at the time they are offered that:
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> > (1) the statements are offered in a civil, criminal or administrative proceeding in which the child or mentally retarded or mentally ill adult is a putative victim of sexual assault . . .[3]
> >
> > (2) the statements were not taken in preparation for a legal proceeding . . .
> >
> > (3) the child or mentally retarded or mentally ill adult is available to testify in court or under Rule 807[4]
> >
> > (4) the time, content and circumstances of the statements provide substantial indicia of trustworthiness.

Following the Supreme Court's ruling, the Board applied this Vermont Rule of Evidence in two cases, ruling that the Department cannot present hearsay evidence without making the under ten child (or mentally disabled adult) available to testify. See Fair Hearings Nos. 16,479 and 16,838. The Board has specifically ruled in those two cases that as the proponent of the hearsay statements, it is the obligation of the Department to procure the attendance of the child (or mentally disabled adult) witness at the hearing for purposes of cross-examination. If it chooses not to do so, all of the

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[3] There follows a long list of enumerated proceedings to which this section applies. As the Supreme Court has already determined that this section applied to expungement proceedings before the Board, it is not necessary to list them.

[4] Rule 807 allows recorded under-oath testimony and testimony via two-way closed circuit television.

hearsay evidence—-therapist and investigator notes, testimony and other recorded statements made by the alleged victim outside of the hearing-—would be disallowed to prove the truth of the allegations.

This particular case is one of first impression before the Board as to the applicability of this rule when the alleged victims of abuse are not under the age of ten and are not being called as witnesses by the Department. In this case, one child witness is deceased and the other is now sixteen. The background facts, which are not disputed by the parties, are nothing short of horrendous. The petitioner, who is the father of both girls, was convicted in 1992 of shooting the girls' mother to death when they were aged five and six. He received a twenty year sentence and is currently incarcerated. After his incarceration, both girls lived with a variety of relatives on both their mother's and their father's side of the family. They were both engaged in therapy to deal with their trauma following their mother's death.[5] In the course of the therapy in 1993, D., the younger

[5] Although this case is apparently solely about a finding that the petitioner sexually abused his daughters, the Commissioner's review indicated that the Department believed the girls had been traumatized by the father's shooting of the mother. It is not clear whether the Department placed in the registry any finding of emotional abuse or risk of harm with regard to these two children, which it certainly could have

child, made an allegation claiming that her father sexually abused her both before her mother died and while he was out on bail pending his trial for the murder. M., the older child, subsequently made a charge as well although there are allegations that she may have withdrawn her accusations shortly before her death. A finding of sexual abuse was made by the Department in 1993 and mailed to the petitioner at a correctional facility. It was apparently mailed to the wrong facility and the petitioner did not get it. In 1997, M., at the age of fourteen, committed suicide by suffocating herself with a plastic bag. At that point D. was taken into SRS custody. During the proceedings whereby SRS became the custodian, the petitioner learned of the sexual abuse allegations substantiated four years before.

SRS has presented an affidavit from D.'s therapist indicating that she is working on issues associated with her "mother's murder, her sister's suicide and vague memories of childhood sexual abuse". It is her professional opinion that it would not be in D.'s best interests to have her appear and give testimony because it could cause "serious detrimental consequences, and adversely affect her ability to function,

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done under the facts. The hearing officer assumes that this matter is solely about the sexual abuse finding.

undoing the progress she has made in treatment thus far" as well as, "retraumatize her and cause her substantial harm". For these reasons the Department has determined that it will not call D. as a witness and has asked that for reasons of "unnecessary hardship" that it be allowed to prove the facts through the child's recorded interviews and written statements, and the testimony of therapists and investigators. It has made the same request with regard to proving the facts of M's abuse because there is no way to present her live testimony now.

If the Board were operating under the "relaxed hearsay" rule (Fair Hearing Rule 12) apparently approved in Selivonik, supra, the hearing officer would undoubtedly find an unnecessary hardship in this case, admit the hearsay testimony and carefully scrutinize it for reliability. The petitioner would be provided with copies of this hearsay evidence or a chance to talk with witnesses before the hearing and could attack the reliability of the evidence at the hearing. SRS argues that this is the standard the Board should adopt in this case since 804a does not specifically apply when the alleged victims are over ten at the time of the hearing.

It is not at all clear after the ruling in In re C.M., supra that the Board is free to use Rule 12 in any sexual

abuse case, even if the child is over ten.[6] While it is true that rule 804A does only specifically apply to the testimony of children under ten, it cannot be ignored that 804a carves out an exception to a general rule prohibiting "hearsay". According to the Supreme Court, the legislature intended in enacting 804a to specifically give the Board the power to accept hearsay evidence in cases where children were under ten, so long as those children were available to testify at the hearing.[7] See In re C.M. supra. The logical corollary to that rule is that the legislature did not intend that hearsay evidence be allowed at all for children over the age of ten. This is undoubtedly because the legislature felt that the testimony of younger children was often difficult to elicit and that the youngest ones might need the help of corroborating hearsay to bolster their allegations. If the Board uses its own Rule 12 for children over ten, it will be in the untenable position of requiring small children to be

[6] The protective agencies have continued to argue in the cases decided since In re C.M. that the Supreme Court did not specifically overrule Selivonik in In re C.M. and that the Selivonik "hearsay admissibility rule" should continue to be used. However, this argument misses the fact that the children were actually made available to testify in Selivonik and that the issue of the "availability" or "unavailability" of the witnesses was not raised before the Supreme Court in that case. It was the quality of the hearsay evidence that was attacked in Selivonik, not the fact of its admissibility. If the children in these cases had been made available, the same kind of hearsay evidence that was approved in Selivonik could presumably have been offered by the protective agencies.

present at hearings in order to admit hearsay statements, but not older children. It must be concluded that such a position would run afoul of the legislative intent in enacting 804a.

Rule 804a reflects a "strong legislative intention to safeguard the right of confrontation [found in the Sixth Amendment to the United States Constitution] while at the same time curing the frequent problem of lack of corroboration caused by the traditional hearsay rules". V.R.E. 804a, Reporter's Notes.[8] Since hearings conducted by this Board are subject to that legislative intent, it must be concluded that the Board is expected to provide more safeguards to petitioners than it has provided in the past regardless of whether the allegations come from nine-year-olds or sixteen-year-olds. Thus, it must be concluded that allegations of sexual abuse made by children of any age are subject to proof through the evidentiary rules and exceptions followed in the civil courts of this state, and not to Fair Hearing Rule 12.

As a final note, the allegations made by M. are subject to a different rule of evidence, V.R.E. 804, because she is

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[7] Of course, this regulation which was intended to "loosen" the rules, actually tightened them with regard to HSB practice.

[8] The Sixth Amendment does not actually apply to hearings before the Human Services Board since they are not criminal prosecutions. However, since non-criminal proceedings were also included in Rule 804a the legislature must have felt that there is some right to confrontation of witnesses even

deceased. The parties have not argued this point but it needs to be addressed briefly. That regulation provides that certain hearsay exceptions may be available if the witness has died, including the admission of testimony given previously at another hearing or a deposition which was under oath and subject to cross-examination. V.R.E. 804(b)(1). The recordings of M.'s statements to investigators would not be admissible under this rule because it was not sworn testimony or subject to cross-examination. While the hearing officer could theoretically find that this requirement is an "unnecessary hardship" in this case and allow unsworn testimony into evidence, such a ruling would be inconsistent with the serious confrontation concerns evidenced by the legislature in dealing with child accusations of sexual abuse. There is no other mechanism available for considering the accusations of this deceased child.

This ruling represents a considerable change in the way facts can be proved before the Board in sexual abuse cases. This ruling will present the Department with some very difficult decisions and is certainly going to be hard on the young children it must protect. However, it appears that the

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in a civil case, presumably pursuant to the Fourteenth Amendment due process clause in the United States Constitution.

legislature wishes it to be this way in order to safeguard the constitutional rights of the accused and the Board has no authority to substitute its judgment for the will of the legislature. 3 V.S.A. § 3091(d). The parties should consider this an interim ruling on an evidentiary issue that may be appealed to the Supreme Court, rather than a final decision on the petitioner's request for expungement.

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